JD–32-05
St. Croix, VI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GRAPETREE SHORES INC., d/b/a
DIVI CARINA BAY RESORT

and

Cases 24-CA-9943
24-CA-9972
24-CA-10004

VIRGIN ISLANDS WORKERS UNION

Jose L. Ortiz, Esq., for the General Counsel.
Charles E. Engeman, Esq. (Ogletree, Deakins, Nash, Smoak, & Stewart, LLC), of St. Thomas, USVI, for the Respondent.
Charlesworth Nicholas, for the Charging Party.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in St. Croix, U.S. Virgin Islands on February 23, 2005. The charge in 24-CA-9943 was filed on August 28, 2004[1] by the Virgin Island Workers Union (the Union); the charge and amended charge in Case 24-CA-9972 were filed by the Union on October 15 and November 24, respectively, and the charge in 24-CA-10004 was filed by the Union on December 14. An order consolidating cases, complaint and notice of hearing (the complaint) was issued November 30. The complaint as amended at the hearing alleges that the Union and Virgin Islands Workers Union Hotel Employees and Restaurant Employees International Union, Local 611, AFL-CIO (Local 611) are the same labor organization and that Grapetree Shores, Inc., d/b/a Divi Carina Bay Resort (Respondent) violated Section 8(a)(5) and (1) of the Act by refusing to sign a collective-bargaining agreement that it had agreed to, refusing to meet and bargain with the Union and refusing to recognize the Union. It also alleges that Respondent failed to meet with the Union about working conditions and grievances, the distribution of work schedules, and the discharge of Theodora Cassimeer. Respondent filed a timely answer that, as amended at the hearing, denied the labor organization status of the Union that the Union and Local 611 are the same entities, and that it had violated the Act.

The central question in this case is whether Respondent was obligated to recognize the Union after Local 611 was disaffiliated from its parent International union.

[1] Unless otherwise indicated all dates are in 2004.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office and place of business in Christiansted, St. Croix, U.S. Virgin Islands operates a hotel. During the past 12 months, Respondent, in the course of those operations derived gross revenues in excess of $500,000 and purchased and received at its hotel goods valued in excess of $50,000 directly from points located outside of the U.S. Virgin Islands. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Although Respondent denies that the Union is a labor organization the record is clear that the Union is an organization in which employees participate and that exists for the purpose of dealing with employers concerning working conditions. I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

The essential facts are not in dispute. As indicated, Respondent operates a hotel in St. Croix. On December 22, 2000, the "Virgin Islands Workers Union Hotel Employees and Restaurant Employees International Union, Local 611, AFL-CIO" was certified as the bargaining representative for all food and beverage employees employed by Respondent in its kitchen, dining room and bar. On February 13, 2002, the "Virgin Islands Workers Union, Local 611, AFL-CIO" was certified as the bargaining representative for all housekeeping and maintenance employees employed by Respondent. Despite the difference in the names of the certified representatives, the parties agree and I conclude that the certified representative is one and the same, namely Local 611. The Union continues to represent employees in other units for other employers in St. Croix.

Charlesworth Nicholas began working for the Local 611 in November 2001 as a part-time field representative. At that time Ralph Mandrew was president of Local 611. In February 2004, Nicholas became acting president after Mandrew fell ill. The Union issued a press release to this effect on April 28. Earlier, on January 7, Mandrew notified Respondent and other employers that Nicholas was authorized to make decisions, negotiate contracts, and settle grievances on his behalf. Nicholas had also worked as a waiter for Respondent from 1999 until he was terminated in July 2003.

The Hotel Employees and Restaurant Employees International Union, AFL-CIO disaffiliated itself from Local 611 and effective November 21, 2003, Local 611 ceased to exist. The disaffiliation came about after the International insisted on a dues increase and Local 611 refused to increase the dues. The assets of Local 611, amounting to $3442, were transferred to the International; the International also assumed the liabilities of Local 611. While 347 employees lost their membership in Local 611 at that time, the Union treated the former Local

611 members as its own members without interruption. There we no union members employed by Respondent because neither Local 611 nor the Union required employees to pay dues until a contract was reached. No vote was taken among employees or union members to determine whether they supported the Union after Local 611 ceased to exist. Instead, employees and members were told months later of the disaffiliation. Local 611 had a set of bylaws. On February 14 the Union's officers met and adopted as its own the bylaws of Local 611 except that references to Local 611 were deleted and replaced with the name of the Union. This resulted in certain discontinuities because the bylaws continued to make reference to the International Union. The officers of Local 611 remained officers of the Union; no elections for officers have been held by either Local 611 or the Union since 2000.

The parties reached agreement on the terms of a collective-bargaining agreement and met to sign it on August 18. The draft agreement prepared by Respondent identified Local 611 as the party to the agreement. Nicholas objected and said that the Union should be named instead as the party to the agreement. This was the first that the Union had notified Respondent of the disaffiliation. After some consideration, Respondent refused to sign a contract with the Union. Nicholas testified that Local 611 received no assistance from the International Union, but documents indicate that Mandrew was paid his salary by the International. Thereafter, Respondent refused to meet with the Union to discuss employee grievance and otherwise refused to recognize the Union as the collective-bargaining representative of the unit employees.

B. Analysis

1. Legal standard

In *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986), the Supreme Court examined and gave guidance on the issue of the proper standard that should be applied in case of an affiliation of one union with another. Although the holding in *Seattle First* concerned whether nonmember employees must be afforded the opportunity to vote on their bargaining representative's decision to affiliate with another union, the Court cautioned that the Board could not allow the discontinuance of recognition of union without first concluding that that the affiliation created a question concerning whether the unit employees continued to support the newly affiliated union. The Court's opinion raised the question of whether the Board had the authority, as a condition for requiring an employer to recognize the newly affiliated union, to require unions to provide due process to employees so that they could have a voice in determining whether they supported the affiliation.

In *Minn-Dak Farmers Cooperative,* 311 NLRB 942 (1993), enfd. 32 F.2d 390 (8th Cir. 1994), a case cited by the General Counsel and decided after *Seattle-First,* the Board indicated that following an affiliation:

> an employer's duty to bargain with the union continues unless the vote on affiliation was not conducted with adequate due-process safeguards or the changes caused by the affiliation were so ``dramatic'' that the post affiliation union lacked substantial continuity with the pre affiliation union. See Seattle-First, 475 U.S. at 199, 206; May Department Stores Co., 289 NLRB 661, 664-665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990); Hammond Publishers, 286 NLRB 49, 50(1987). Further, it well established that the ``party seeking to avoid an otherwise binding bargaining obligation by asserting the

> change in the bargaining representative following a merger bears the burden of demonstrating that change." H. B. Design & Mfg., 299 NLRB 73,73-74(1990). Accord: May Dept. Stores Co. v. NLRB, 897 F.2d 221, 228 (7th Cir. 1990); News/Sun Sentinel Co. v. NLRB, 890 F.2d 430, 432 (D.C. Cir. 1989).

In *Sullivan Bros. Printers*, 317 NLRB 561 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996), the Board stated:

> Consistent with the Supreme Court's admonition in NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank), 475 U.S. 192 (1986), that the paramount policy of the Act, i.e., encouraging stable bargaining relationships to preserve industrial peace, should not be unnecessarily disrupted, the Board will interject itself only in the most limited of circumstances involving such internal changes. Thus, only where an affiliation vote is conducted with less than adequate due process safeguards or where the organizational changes are so dramatic that the post affiliation union lacks substantial continuity to bargain does not continue. [Footnote omitted]

In *Sullivan Bros.* the employees were accorded the opportunity to vote on the matter of whether the union should merge with and union. Because the Board concluded that the due process requirements have been met in that case, it found it unnecessary to determine whether, the Supreme Court in *Seattle-First*, had concluded that the Board lacks authority to impose due process requirements.

2. Arguments

The General Counsel argues first that Respondent violated the Act because it relied on the disaffiliation of Local 611 from the International rather than on the fact that there was a question concerning representation created by the disaffiliation. I disagree. I note that the General Counsel cites no legal authority to support this hyper-technical interpretation of the Act. Moreover, by citing the disaffiliation as the reason for withdrawing recognition Respondent was, in fact, raising the issue of whether the employees supported the Union.

The General Counsel then addresses the due process requirement that, as set forth above, the Board has traditionally required at least to some degree. He argues "consistent with *Sea-First*, the due process requirement should not be applied in affiliation/disaffiliation cases when there has been no change in the essential identity of the bargaining representative." It should be noted again that in this case the employees were not given any opportunity at all to have a voice in the decision to have the Union displace Local 611 after the disaffiliation. *Allied Mechanical Services*, 341 NLRB No. 141 (2004), involved a case where the employees were also not given an opportunity to vote on a merger of unions. The Board found that the employer there did not unlawfully withdraw recognition. The Board stated:

> Following an incumbent union's merger or affiliation, an employer's duty to recognize and bargain with the union continues unless the union's members did not have an adequate opportunity to participate in a vote on the merger, the vote was conducted without adequate due process safeguards, or the merger caused changes so significant that substantial continuity was lost between the pre- and

post-affiliation union. *NLRB v. Financial Institution Employees (Seattle-First National Bank),* 475 U.S. 192, 199 (1986); *Minn-Dak Farmers Cooperative,* 311 NLRB 942, 945 (1993), enfd. 32 F.3d 390 (8th Cir. 1994).

The General Counsel seeks to narrow the holding of *Allied Mechanical* to cases only involving mergers, but the Board made no such distinction. The clear language of the Board's holding applies to both mergers and affiliations and the Board cited *Seattle-First* and *Minn-Dak;* both of those cases involved affiliations. I conclude that the Board has rejected the notion that the due process requirement may be dropped as a requirement in affiliation cases.

The General Counsel relies heavily on *Springfield Hospital,* 281 NLRB 643 (1986). There too no employees were allowed to vote. That case involved the disaffiliation of a union from a national union affiliated with the AFL-CIO that occurred as a result of the union being chartered directly by the AFL-CIO. Although it might be useful for the Board to reconcile its holding in that case with its holding in *Allied Services,* it is sufficient at this point for me to note that the factual situation in *Springfield Hospital* is simply not the factual situation present in this case.

The General Counsel also argues that the due process requirement should not be required in this case because the Union's internal rules did not allow employees to vote because they were not yet dues-paying members. This argument is not persuasive. A union cannot avoid the requirements of the Act simply because its internal rules do not allow it to do so.

The General Counsel also argues that the due process requirement was met when employees voted to reject the dues increase that the International had mandated. But a vote on a dues increase is not at all like a vote on disaffiliation and the two cannot be equated. Importantly, there is no evidence that the employees were advised that their rejection of a dues increase would result in the disaffiliation.

The General Counsel points out that Respondent continued to bargain with the Union even after the disaffiliation. But that is meaningless because there is no evidence that Respondent was aware of the disaffiliation. To the contrary, the evidence shows that Respondent sought to sign a contract with Local 611 and it was only after the Union wanted to change the name in the contract that Respondent protested.

I conclude that Respondent has shown that the due process requirement has not been met in this case. Under these circumstances, I further conclude that Respondent has shown that there is a question concerning whether the unit employees desire to be represented by the Union. Like the Board in *Allied Services* I find it unnecessary to decide whether there was a substantial continuity of representation after the disaffiliation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules. Be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C., May 10, 2005.

_____
William G. Kocol
Administrative Law Judge